

Education Law

The newsletter of the Illinois State Bar Association's Section on Education Law

Frakes v. Peoria School District No. 150

BY ROLAND R. CROSS, BROWN, HAY & STEPHENS, LLP

On September 26, 2017, the Seventh Circuit Court of Appeals affirmed the District Court's granting of summary judgment to the Peoria School District in finding that the employee failed to show that she engaged in any protected activity giving rise to a Section 504 claim. 2017 WL

4250079. Although the employee provided some evidence that her "unsatisfactory" performance rating may have been unfair and that her preferred teaching method may have been better suited to disabled students, the Court concluded that these

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What constitutes being a "public body" subject to the provisions of FOIA – *Better Government Association v. Illinois High School Association, et al.*

BY PATRICK T. DRISCOLL, JR.

The Illinois Supreme Court, in *Better Government Association v. Illinois High School Association, et al.*, 2017 IL 121124, determined that the Illinois High School Association (the IHSA) was not a "public body" as defined by the Freedom

Information Act (FOIA or the Act), 5 ILCS 140/2 (West 2014).

Background

The Better Government Association

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Frakes v. Peoria School District No. 150

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possibilities did not render the employee's teaching style a protected activity under Section 504 of the Rehabilitation Act of 1973. The Court also concluded that the employee provided no evidence that she complained about or discouraged discrimination based on disability or engaged in any other protected activity.

Between August 2002 and May 2012, Frakes was a special education teacher in Peoria. Beginning in August, 2006, she was assigned to the Day Treatment Program, where she taught Junior High School Students with various disabilities and behavioral and emotional disorders. In February 2012, Frakes' supervisor gave her an overall performance rating of "unsatisfactory." In her detailed evaluation, the supervisor noted that Frakes struggled with classroom management and had poor organizational skills. The evaluation noted that Frakes did not collect data on her students' performance at the expected frequency, arrived to work late and left her classroom in a chaotic state. Further, Frakes would not comply with her supervisor's directions and left valuable instruction time wasted.

When Frakes received the evaluation, she refused to sign and prepared a "Points for Rebuttal." In this document, Frakes admitted that she needed improvement in her performance and at times struggled with classroom management. Frakes did not mention her students' rights or argue that her methods of teaching were better for her disabled students.

As a result of the "unsatisfactory" evaluation, Frakes was placed on a remediation plan, but before the remediation period could begin, she informed the district that she was unable to work due to serious health conditions. She was placed on medical leave for the remainder of the school year. There is no record that Frakes objected to anything in her students' IEPs or behavior intervention plans or complained that the supervisor's evaluations encouraged discrimination

against disabled students. On April 9, 2012, Frakes was honorably dismissed due to the school district's decision to reduce its teaching force. As a result of her "unsatisfactory" rating, Frakes was placed in "Group II" and given an honorable dismissal.

Frakes proceeded against the school district in both federal and state courts. In her state case, Frakes asserted that she was wrongfully terminated based on Section 24-12 of the Illinois School Code. In the State claim, she did not raise any federal claims, and the case was dismissed at summary judgment.

A week before she filed her state law claim, Frakes filed a claim against the District in federal court, claiming that her dismissal violated Section 504 of the Rehabilitation Act of 1973, 29 USC Section 794. The district was granted summary judgment in the federal claim, finding that Frakes did not provide evidence that she engaged in activity protected by Section 504.

In affirming the district court's granting of summary judgment to the school district, the appellate court noted that Section 504 employment discrimination claims are controlled by the standards of the ADA, and a claim for "interference" pursuant to Section 504 is established pursuant to the standards of the ADA. Under the ADA's anti-interference provision, it is unlawful to "coerce, intimidate, threaten, or interfere with any individual and the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on the account of his or her having aided or encouraged any the other individual in the exercise or enjoyment of, any right granted or protected by [the ADA]." 42 USC Section 12203(b). In noting a Ninth Circuit case that interpreted the anti-interference provision of the Fair Housing Act, the Court adopted the same framework [for a Section 504 claim] stating that a plaintiff alleging ADA interference must demonstrate that: (1) she engaged

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in activities statutorily protected by the ADA; (2) she was engaged in, or aided or encouraged others in, the exercise or enjoyment of ADA protected rights; (3) that defendants coerced, threatened, intimidated or interfered on account of her protected activity; and (4) the defendants were motivated by an intent to discriminate.

Frakes asserted that she engaged in protected activity when she refused to

change her teaching methods following the supervisor's negative performance evaluation. However, the court concluded that there was no evidence that Frakes' opposition to the supervisor's evaluation was an assertion of rights on behalf of her disabled students. Nothing suggested by Frakes indicated that her teaching methods were preferred for behaviorally or emotionally disabled students. The fact that Frakes taught students who were protected

by the ADA does not alone render her teaching "protected activity." Nothing in the record indicated that Frakes' teaching style would be protected under the ADA. Frakes only argument -- that her teaching methods could be better for some students -- is a subjective view that lacks any statutory protection. Therefore, because Frakes failed to demonstrate that she engaged in a protected activity, her Section 504 claim failed. ■

What constitutes being a "public body" subject to the provisions of FOIA

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(the BGA) submitted a FOIA request to the IHSA in 2014 seeking various records of the IHSA for the 2012-2013 and 2013-2014 fiscal years. The BGA requested copies of contracts from the IHSA involving contractors such as Nike and Gatorade. The IHSA refused to produce any records, claiming it is a not-for-profit charitable organization, and thus, not subject to the provisions of FOIA.

The BGA then requested the same records from School District 230 (District 230), which is a member of the IHSA. School District 230 responded that it did not have any responsive documents and that the records were not subject to FOIA. The BGA then filed suit in the Circuit Court of Cook County, which court ultimately held that the IHSA was not a public body and that District 230 had no duty to obtain and disclose the IHSA records. The Appellate Court affirmed the Circuit Court. 2016 IL App. (1st) 151356.

The Facts

The IHSA is a private, not-for-profit, unincorporated association. Over 800 high schools in Illinois are members. The IHSA establishes bylaws and rules for sports competitions and enforces its rules. The IHSA also sponsors and coordinates tournaments in sports in which member schools choose to participate. ¶3.

The IHSA is governed by a 10 member board. Each board member is a principal

of a member school. ¶5. The IHSA employs an Executive Director and staff. ¶7. Its revenue comes from events it runs and from sponsorships it receives. ¶12. The employees of IHSA are not public employees, not paid from public funds and not subject to government pension or insurance programs. ¶14.

After the IHSA refused to produce any records, the BGA sued District 230 to get the same records that had been requested of the IHSA, claiming that the IHSA performs governmental functions for District 230. ¶9. District 230 moved to dismiss the claim, arguing that the records sought were not "public records" of the District and not related to any claimed governmental functions the IHSA may perform for District 230. ¶15.

The Appellate Court found that IHSA did not perform any public, governmental function, and the IHSA was not controlled by a governmental entity and did not receive any public funds. District 230 did not have any "public records" as defined by FOIA. ¶17.

The Supreme Court's Analysis

The Court first considered whether the IHSA was a "public body" as defined by FOIA. The Act defines a "public body." 5 ILCS 140/2(a). A plain reading of the Act shows that the IHSA is not one of the specifically named bodies of state or local government. ¶23.

The Court next had to determine if the IHSA was a "subsidiary" body of a governmental unit. The Act provides that "committees and subcommittees" of a public body are within the control of a public body and thus subordinate to that public body. ¶23.

FOIA requires that each organization's argument must be reviewed on a case by case basis. ¶24. The Court looked to the Open Meetings Act (OMA) (5 ILCS 120/1.02 West 2014) for guidance on what constitutes a public body and determined that there was no reason to distinguish between FOIA and OMA to determine whether the IHSA was a "subsidiary" body under FOIA. ¶25.

The BGA also claimed that federal civil rights legislation, 42 USC §1983, allows private entities to enforce rights against defendants who act under color of state law. ¶27. The BGA's argument was not persuasive. The Court refused to expand the definition of a subsidiary body to an organization that was a state actor for purposes of §1983. ¶31.

The BGA also argued that the IHSA was a "local public entity" for purposes of the Tort Immunity Act. The Court determined that to have tort immunity, the not-for-profit organization must be subject to operational control by the unit of local government. ¶32. IHSA is not a "local public entity" under the Tort Immunity Act. ¶33.

The Court reviewed the organizational structure of the IHSA noting the following: (1) it has had a separate legal existence for over 100 years, (2) it is a voluntary unincorporated association that can sue or be sued, and (3) it has its own constitution and board of directors. ¶37. The IHSA was not created by any public body and is not part of or housed within a public body. ¶38.

The degree of any governmental control over the IHSA was discussed by the Court. The IHSA board is not controlled by any government, including any school districts. Membership in the IHSA by school districts is not mandatory. ¶40. No actions taken by the IHSA board need approval by any unit of government. ¶41. The IHSA employees and executive director are not government employees and are not paid from government funds and are not part of government retirement or insurance

programs. ¶43.

The IHSA does not receive any direct government funding and does not charge any dues from its member schools. ¶49. Any revenue it generates comes from its own organizational efforts. ¶53. The Circuit Court of Cook County properly found that the IHSA is not a public body as defined by FOIA. ¶55.

The BGA also claimed that District 230 had a duty to disclose the requested records of the IHSA because the IHSA performed as a governmental function for District 230, which is a public body defined by FOIA. ¶59. Sec. 7(2) of FOIA prohibits public bodies from avoiding disclosure by delegating by contract, responsibilities to a private entity. ¶62.

District 230's responsibilities are governed by the School Code. 10 5 ILCS 5/1-1 et seq. (West 2014). Governing

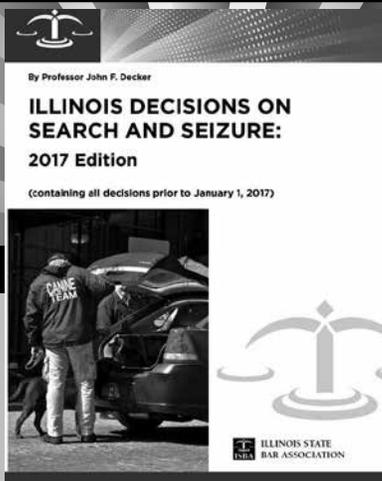
and coordinating athletic competitions is not a statutory requirement of District 230. While District 230 can form or join associations, such as the IHSA, the IHSA is not acting on behalf of District 230 and does not perform any of the District's responsibilities. District 230 did not delegate any of its statutory functions to the IHSA. ¶64.

Conclusion

Because the IHSA did not contract to perform any governmental function on behalf of District 230, it is not a public body as defined by FOIA, and the requested records of the District are not public records under FOIA. ■

This article was originally published in the December 2017 issue of the ISBA's Government Lawyers newsletter.

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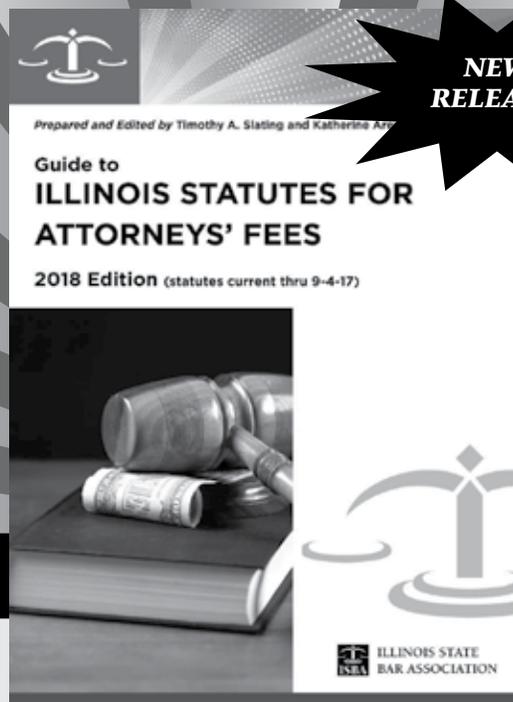
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Wednesday, 01-10-18 – LIVE Webcast—On My Own: Starting Your Solo Practice as a Female Attorney. Presented by WATL. 12-2 PM.

Thursday, 01-11-18 – ISBA Chicago Regional Office—Six Months to GDPR – Ready or Not? Presented by Intellectual Property. 8:45 AM – 12:30 PM.

Friday, 01-12-18, Chicago, ISBA Regional Office—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section. 8:30 am – 5:00 pm.

Friday, 01-12-18, Chicago, Live Webcast—How to Handle a Construction Case Mediation. Presented by the Construction Law Section, co-sponsored by the Alternative Dispute Resolution Section. 8:30 am – 5:00 pm.

Tuesday, 01-16-18 – LIVE Webcast—Proper Pleadings: Complaints, Answers, Affirmative Defenses, Motions for a More Definite Statement, Motions to Strike, and Motions for Judgement on the Pleadings. Presented by Labor and Employment. 1:30-3 PM.

Wednesday, 01-17-18 – LIVE Webcast—Clearing the Skies: How to Fly with the Mandatory Initial Pilot Program. Presented by Intellectual Property. 12-1 PM.

Thursday, 01-18-18 – ISBA Chicago Regional Office—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Thursday, 01-18-18 – LIVE Webcast—Closely Held Business Owner Separations, Marital and Non-Marital. Presented by Business and Securities. 9AM - 12:30 PM.

Tuesday, 01-23-18 Webinar—Technology for Your Practice: Beyond the Buy – Understanding the Why. Practice Toolbox Series. 12:00-1:00 PM.

Thursday, 01-25-18 – ISBA Chicago Regional Office—Starting Your Law Practice. Presented by General Practice. 8:50 AM – 4:45 PM.

Tuesday, 01-30-18 LIVE Webcast—Concerted Activity in the Age of Social Media and Online Systems: Employee Rights, Employer Pitfalls, Remedies and Penalties. Presented by Labor and Employment. 2-4 PM.

Wednesday, 01-31-18 ISBA Chicago Regional Office—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

Wednesday, 01-31-18 LIVE Webcast—Recent Developments in State and Local Taxation - Explosive Issues and the Steady Drip, Drip, Drips. Presented by SALT. 9AM – 1PM.

February:

Thursday, 02-01-18 – LIVE Webcast—Storm Water Regulation Under the National Pollutant Discharge Elimination System (NPDES). Presented by Environmental Law. 11AM – 12PM.

Thursday, 02-01-18 – LIVE Webcast—The Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) Permit Program. Presented by Business Advice and Financial Planning. 1:30PM – 2:30PM.

Friday, 02-02-18 – Normal, IL—Hot Topics in Agriculture Law – 2018. Presented by Agriculture Law. All-day.

Friday, 02-02-18 – ISBA Chicago Regional Office—2018 Federal Tax Conference. Presented by Federal tax. All Day.

Friday, 02-02-18 – LIVE Webcast—2018 Federal Tax Conference. Presented by Federal tax. All Day.

Feb 6 - June 26—Fred Lane's ISBA Trial Technique Institute.

Wednesday, 02-07-18 – Webinar—TITLE INSURANCE 101: HOW TO HANDLE COMMON TITLE INSURANCE AND COVERAGE ISSUES IN RESIDENTIAL REAL ESTATE TRANSACTIONS—A Primer for New Attorneys and Those 'New' to Real Estate Law Practice. Presented by Real Estate. Time: 2-3 PM.

Friday, 02-09-18 – SIU Carbondale—Central and Southern Illinois Animal Law Conference. Presented by Animal Law. 8:00AM to 5:30PM.

Monday, 02-12 to Friday, 02-16—ISBA Chicago Regional Office—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Tuesday, 02-13-18 Webinar—Cloud Services. Practice Toolbox Series. 12:00-1:00 PM.

Monday, 02-19-18 – Chicago, ISBA Regional Office—Workers' Compensation Update – Spring 2018. Presented by Workers' Compensation. Time: 9:00 am – 4:00 pm.

Monday, 02-19-18 – O’Fallon—Workers’ Compensation Update – Spring 2018. Presented by Workers’ Compensation. Time: 9:00 am – 4:00 pm.

Tuesday, 02-27-18 Webinar—Security is Only as Good as the Weakest Link: Security Measures Every Lawyer Should Take. Practice Toolbox Series. 12:00-1:00 PM.

Wednesday, 02-28-18 – ISBA Chicago Regional Office—Copyright and Student Records Issues in Education. Presented by Education Law. 9:00 AM- 12:30 PM.

Wednesday, 02-28-18 – LIVE Webcast—Copyright and Student Records Issues in Education. Presented by Education Law. 9:00 AM- 12:30 PM.

March

Friday, 03-02-18 – ISBA Chicago Regional Office—9th Annual Animal Law Conference. Presented by Animal Law. 9:00AM to 4:30PM.

Tuesday, 03-06-18 – LIVE Webcast—The Ethics of Social Media for Attorneys and Judges. Presented by Bench and Bar. 1:00-2:30 PM.

Thursday, 03-08-18 – ISBA Chicago Regional Office—The Complete UCC. Master Series, Presented by the ISBA. 8:30-5:00.

Friday, 03-09-18 – ISBA Chicago Regional Office—Malpractice Avoidance Program. Presented by Trusts and Estates. 8:30-4:00.

Friday, 03-09-18 – Webcast—Malpractice Avoidance Program. Presented by Trusts and Estates. 8:30-4:00.

Monday, 03-12 to Friday, 03-16— Pere Marquette Lodge, Grafton IL—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

Tuesday, 03-13-18 – LIVE Webcast—Don’t Panic – What to do When a Letter

Arrives from the ARDC. Presented by ARDC. 2:00-3:00 PM.

Thursday, 03-15-18 – Webinar—Hello My Name is PAC: An Introduction to the Attorney General’s Public Access Duties. Presented by Local Government. 12:00-1:00 PM.

Friday, 03-16-18 – Holiday Inn & Suites, Bloomington—Solo and Small Firm Practice Institute. All day.

Wednesday, 03-21-18 – LIVE Webcast—Topics in Professionalism 2018: Mental Health and Substance Abuse Impacting Lawyers, and Diversity and Inclusion in the Legal Profession. Presented by General Practice. 12:00-2:00 PM.

Friday, 03-23-18 – ISBA Chicago Regional Office—Applied Evidence: Evidence in Employment Trials. Presented by Labor and Employment. 9:00 am – 5:00

pm.

Friday, 03-23-17 – LIVE Webcast—Applied Evidence: Evidence in Employment Trials. Presented by Labor and Employment. 9:00 am – 5:00 pm.

April

Thursday, 04-13-18 – NIU Hoffman Estates—Spring 2018 DUI and Traffic Law Program. Presented by Traffic Law. All day.

May

Friday, 05-11-18 – ISBA Chicago Regional Office—Evidence: Discussions about obtaining evidence, foundation issues, objections and effective presentation to maximize proof. Presented by Civil Practice and Procedure. 8:50-4:30.

June

Friday, 06-01-18 – NIU Naperville, Naperville—Solo and Small Firm Practice Institute. All day. ■



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